No. 1825

In the United States Circuit Court of Appeals

For the Ninth Circuit.

CHAS. H. LILLY CO.,

Plaintiff in Error,

vs.

CHAS. S. BRENT & BRO.,

Defendant in Error.

Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Northern Division.

Reply Brief of Plaintiff in Error.

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ALASKA PRINTING CO., ALASKA BUILDING, SEATTLE

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Defendant in error's argument in support of the ruling of the court in granting his motion for a directed verdict is placed under three heads:

1st. The reasons given in the court's order denying a motion for a new trial.

2nd. Plaintiff in error acquiesced in defendant's construction of contract because he accepted the goods.

3rd. In any event the defendant in error had established a universal custom throughout the United States fixing the weight of a bushel at 14 pounds.

Before taking up the reply to these contentions we desire to say a word apropos to counsel's calling the court's attention to our use of the word "pounds" instead of the symbol therefor, #. We have never claimed that the symbol # could possibly mean anything else than pound, a measure of weight. We do claim, however, that the expression "bu (14#)" when used in reference to seeds has a particular meaning to plaintiffs in error and those engaged in the business in the West, viz., it means that the seed is of such a quality that when sowing 14 pounds should be used for a bushel. This is the rate for the best grade of seed—a poorer germinating quality of seed would require a higher rate.

I.

Reasons given by court.

The court admits in his decision that if this contract depended on custom it should have gone to the jury. (See Record 233.) Now we maintain that before the court heard the evidence of custom he held the contract to be ambiguous and dependent upon custom for its interpretation. We objected to evidence of custom, claiming contract was not ambiguous. This the court overruled. (Record pp. 28-29.) Again we claim that defendant in error admits the contract is not plain because in his complaint he

pleads custom. Also at trial he started to prove custom at once to explain the contract. Again, defendant's effort in his brief to dodge this point of ours by claiming he drew his complaint so as to plead an ambiguous contract and also a contract explainable by custom, is untenable. His complaint pleads but one cause of action.

Now this opinion of the trial court is what might be termed counsel for defendant's first citation in support of his contention that the directed verdict was proper. If he takes it for his benefit, he must also accept it for his injury and we submit that when he held that if custom controls the case should go to the jury, it shows he erred in directing the verdict.

Again: In that opinion (p. 233) the court says:

"There can be no question but that the plaintiff at all times understood the contract to call for fourteen pounds to the bushel."

Yet our order (Exhibit B) reads:

"One minimum car Kentucky grass seed weighing 21 pounds to the bushel at $1.40 per bushel."

Now if that did not convey to defendant in error that we ordered 21 pounds for $1.40, how can it be said that anything he wrote to us would inform us that we were only to get 14 pounds?

Again the court says:

"In his letter of June 27 to the defendant plaintiff expressly defined a bushel as being 14 pounds."

Here is where the court closes his eyes to what the use of the expression "bu. (14#)" means to us. Seed men of the West sow 3 bushels to the acre and 14# to the bushel of best quality seed. The evidence is direct and positive on this (Record pp. 166-186-147-178.) On pp. 165 and 153 the court refused to let us show the meaning of that term to the party making the contract, holding that his understanding did not "cut any figure in the case." Why then hold the plaintiff did not understand our order? Is it not plainer? Here we have the court holding that we knew we were only to get 14 pounds to the bushel and when we offered to prove that 14 pounds for $1.40 was about 25% over the market price, we were not allowed to do so. In other words, the plaintiff in error knowingly agreed to give the defendant in error 25% more than what he could have bought elsewhere for. Should not this fact, taken in connection with the wording of our order, show that we did not understand the letter of June 27 in the light in which it now appears it was written?

The remaining reasons of the learned trial court are discussed in our former brief.

Counsel next proceeds to argue in his brief, page 22, that the evidence shows we would make a handsome profit by buying at 14# to the bushel and hence converted the seed to our own use at an advantage, instead of letting the defendant in error sell and make this profit. In the first place, we say, if there is any evidence here of the market price of these seeds then the court manifestly erred in refusing to admit our testimony on that line. If defendant in error can get in evidence on that point so that he is justified in calling the Appellate Court's attention to it, is he not thereby in effect admitting that the court erred in closing our mouths on that line?

Is the fact that we might or might not be able to buy at that figure and still make a profit anything to aid the court in interpreting the contract?

Again: Do the telegram and letters not show that plaintiff in error absolutely refused to accept the car under that price? Certainly. And the defendant in error, instead of taking it and making the higher profit, as counsel on page 23 of his brief says he could have done, refused absolutely to take it. It cannot consistently be claimed in this case that plaintiff in error accepted the car with any such understanding.

Counsel then argues that in any event he has proven a universal custom of 14# constituting a bushel. Our answer is that the first authority cited by him, the opinion of the trial court, settles that question adversely to his contention.

Again: If the actual weight of the seed at 21# to the bushel was to be the test of quality and we so understood it, why should we have insisted upon samples and submitting to government test?

To hold that these parties' minds met on a basis of 14# to the bushel seems to us to wholly ignore the evidence of Sandahl, Schuett, Lilly, Leckenby et al., that they would interpret defendant in error's offer to mean 21# to the bushel; is to make the letter of June 27th a part of the contract and to ignore the manner in which plaintiff in error uses the expression "bu. (14#)"; is to lose sight of the fact that we ordered on the basis of 21# to the bushel; is to overlook the fact that the quality of the seed was to be determined by sample and government test and that on a basis of 14# to the bushel is about 25% higher than we could have purchased elsewhere for.

Surely the best that can be said on defendant in error's behalf is that the minds of the parties did not meet on this point.

We respectfully submit that the court erred in directing a verdict upon a basis of 14 pounds to the bushel.

JOHN H. ALLEN,
Attorney for Plaintiff in Error.